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RESPONSE REQUESTED

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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-333

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Lewis Smith, hereby moves the Court to allow him to proceed in forma pauperis. His attorney's affidavit in support of this motion is attached as Exhibit A.

Submitted by,

JOHN C. CASON
Hooper & Cason
456 South Court Street
Montgomery, Alabama
(205) 834-3200

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be delivered a true and correct copy of same, United States postage prepaid, and correctly addressed to Don Siegelman, Attorney General, and Paul David Bjresberg, Assistant Attorney General of the State of Alabama.

Done this the 22 day of November, 1988.

ATTORNEY FOR RESPONDENT

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EXHIBIT A

NO. 88-333

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

AFFIDAVIT OF ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, John C. Cason, Attorney for James Lewis Smith, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees or costs therefor, I state that because of his financial condition he is unable to pay the costs of said proceeding.

I further swear that the responses which I have made to the questions and instructions below, relating to his ability to pay the cost of prosecuting the appeal, are true and are personally known to me.

1. Are you presently employed? No, incarcerated at 110 Warrior Lane, Bessemer, Alabama 35023, for a term of 30 years in the State penitentiary.

A. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Approximate 1986 as a Janitor at minimum wage.

2. Have you received within the past twelve months any income from a business, profession, or other form of

self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash, checking or savings accounts? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

JOHN C. CASON
Attorney for James Lewis Smith

SUBSCRIBED AND SWORN TO before me this the 22 day of _____, 1988.

NOTARY PUBLIC

MY COMMISSION EXPIRES: 5/20/91

NO. 88-333

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN C. CASON
Hooper & Cason
456 South Court Street
Montgomery, AL 36104
(205) 834-3200

COUNSEL FOR RESPONDENT

NO. 88-333

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James Lewis Smith, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Alabama Supreme Court's opinion in this case. That opinion is reported in Petitioner's Appendix as Appendix A.

QUESTION PRESENTED

1. Should this Court grant certiorari when this Court's opinion, North Carolina vs. Pearce, 395 U.S. 711 (1969), is not in conflict with the decision of the Alabama Supreme Court in this case and where, under the analysis required by Rice vs. Simpson, 274 F. Supp. 116 (M.D. Ala. 1967), Aff'd, 396 F.2d 499 (5th Cir. 1968), affirmed sub nom. North Carolina vs. Pearce, 395 U.S. 711 (1969), as the applicable rule in Alabama applied in this case?

PARTIES

Respondent adopts the Petitioner's statement with respect to the parties.

STATEMENT

Petitioner's statement of the case is incomplete, and like the entire Petition, misleading. This statement of the case is not intended to summarize completely the proceedings below, but rather to point out the most significant misstatements and omissions of the Petitioner.

The Court of Criminal Appeals determine that the Respondent, James Lewis Smith, had not been properly informed of the potential sentences before pleading guilty, reversed the conviction and sentences, and remanded the case to the trial court. Smith vs. State, 494 So.2d 182 (Ala. Crim. App. 1986). The defendant was then tried on all three charges and was sentenced to concurrent life sentences for Burglary I and Sodomy I and 150 years for Rape I to run consecutively (J.R. 401-403, Appendix B).

REASONS FOR DENYING THE PETITION

I. The Alabama Supreme Court Decision is not a departure from existing principles setting guidelines for sentence enhancement under North Carolina vs. Pearce, 395 U.S. 711 (1969), or the greater standard set for sentence enhancement in Alabama under Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

Under North Carolina vs. Pearce, 395 U.S. 711 (1969), a sentence may be increased "in the light of events subsequent to the first trial" if the circumstances so warrant said

enchancement. This is an exception to the general rule in Alabama which prohibits any increase in sentence in a criminal case after a sentence has been imposed, including the imposition of a harsher sentence upon a reconviction of a defendant who successfully exercises his appeal rights, overturns the first conviction, and gains a new trial. Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

The defendant in this case orginally plead guilty to all three charges and was sentenced to 30 years concurrent on each count. Subsequently, said conviction was overturned by the Alabama Court of Criminal Appeals and remanded for a new trial. Smith vs. State, 494 So.2d 182 (Ala. Crim. App. 1986).

Upon reconviction the defendant's sentence was enhanced as stated, which is in clear violation of the principles enumerated in Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

It is abundantly clear that the standards of sentence enhancement in Alabama exceed those required in North Carolina vs. Pearce, 395 U.S. 711 (1969).

Further in support of the greater standard set in Alabama for sentence enhancement the language from Rice vs. Simpson, 272 F. Supp. 116 (M.D. Ala. 1967), aff'd, 396 F.2d 499 (5th Cir. 1968),. aff'd sub nom. North Carolina vs. Pearce, 395 U.S. 711 (1969), has been declared by the Alabama Supreme Court in this particular case as the applicable rule in Alabama.

Conclusively, there is no conflict in the Alabama Supreme Court decision in this case as it sets a greater standard for sentence enhancement rather than being in conflict with the standards required by the language from North Carolina vs. Pearce, 395 U.S. 711 (1969):

II. This Court should deny certiorari based upon the State's allegation that the Alabama Supreme Court presumed judicial vindictiveness and misapplied Federal Constitutional Law.

The appellants argue the Alabama Supreme Court misapplied Federal Constitutional Law by presuming judicial vindictiveness; however, there is nothing in the opinion of the Alabama Supreme Court in this case that implied or expressly hints that the Alabama Supreme Court presumed such a thing.

This argument is groundless and is founded upon erroneous presumption not in the record.

III. This Court should deny certiorari in said case for the defendant has been resentenced by the lower Trial Court thus rendering said case mute.

On the 1st day of July, 1988, the State of Alabama filed a Motion to Stay Pending Appeal to the United States Supreme Court (See Exh. 1). On the 18th day of July, 1988, the Supreme Court of Alabama denied said request (See Exh. 2). On the 13th day of September 1988, the lower Court resentenced the defendant for thirty (30) years in the penitentiary, all cases to run concurrent (See Exh. 3).

Thus, the issue of the defendant's sentence enhancement is a mute issue since he has now received his new sentence which can not be appealed after 42 days from the date of sentence under Alabama Rules of Appellate Procedure, Rule 4(a)(1).

CONCLUSION

The issue of whether or not a sentence can be enhanced are clearly defined in North Carolina vs. Pearce, 395 U.S. 711 (1969). Further, the greater standard of sentence enhancement in Alabama has been clearly established in Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

Thus your Respondent would contend there is no actual controversy before this Court and thus the Petition for Writ of Certiorari should be denied.

Submitted by:

JOHN C. CASON
Attorney for Respondent

OF COUNSEL:

Hooper & Cason
456 South Court Street
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Don Siegelman, Attorney General, State of Alabama, and David Bjurberg, Assistant Attorney General of Alabama by placing copy of same in the U. S. Mail, postage prepaid this the 22 day of November, 1988.

OF COUNSEL

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA, *
Plaintiff *
CASE NO. CC-85-1682-84
vs. *
JAMES LEWIS SMITH, *

ORDER

Pursuant to the opinion of the Supreme Court of Alabama, October Term, 1987-88, in reference to the Petition for Writ of Certiorari to the Court of Criminal Appeals, Case No. 86-1448, the Court hereby resentences the above-named defendant to thirty (30) years in the penitentiary on Case Nos. 85-1683 and 1684 to run concurrent with each other and Case No. 85-1682.

DONE this 13th day of September, 1988.

CHARLES PRICE, Circuit Judge

cc: John Cason
David Belser

S. C. NO. 86-1448

IN THE SUPREME COURT OF ALABAMA

EX PARTE: JAMES LEWIS SMITH,

IN RE: JAMES LEWIS SMITH,

APPELLANT-PETITIONER

VS.

STATE OF ALABAMA,

APPELLEE-RESPONDENT

MOTION TO STAY PENDING APPEAL
TO THE UNITED STATES SUPREME COURT

Comes now the Appellee in the above-styled cause and respectfully request this Court that it stay any further action on this matter until it can be adjudicated by the United States Supreme Court. A petition for writ of certiorari will be filed with the United States Supreme Court by August 23, 1988.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY-

J. RANDALL McNEILL
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of July, 1988, served a copy of the foregoing on the attorney for the Appellant, Hon. John C. Cason, Attorney at Law, 503 South Court Street, Suite 320, Montgomery, AL 36104, by placing same in the United States Mail, postage prepaid.

J. RANDALL McNEILL
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

0007h

THE STATE OF ALABAMA - - - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

July 18, 1988

86-1448

Ex Parte James Lewis Smith

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: James Lewis Smith v. State)

ORDER

The Attorney General of the State of Alabama having filed a motion to stay further proceedings in this case pending an appeal to the United States Supreme Court, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion to stay further proceedings is denied.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 18th day of July, 1988.

Robert G. Esdale

Clerk, Supreme Court of Alabama